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NO. 80-644

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

G. D. SEARLE & COMPANY,

Petitioner,

vs.

SUSAN COHN and WALTER COHN,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

May a foreign corporation which is not "doing business" in a State but which is amenable to the State's long-arm jurisdiction in a particular case be constitutionally prohibited from asserting the State's statute of limitations merely because it has not registered an agent in the State to accept service of process and thereby consented to the State's exercise of *in personam* jurisdiction over it in *all* cases?

RULE 28.1 STATEMENT

Petitioner, G. D. Searle & Co., has the following subsidiaries and affiliates:

G. D. Searle Inter-American Co., G. D. Searle Far East, Inc., G. D. Searle International Capital Co., Searle Chemicals, Inc., Searle Caribbean, Inc., Searle Cardio-Pulmonary Systems, Inc., Searle Pharmaceuticals, Inc., Searle Met Inc., Searle Food Resources, Inc., SCI Corp., LARO, Inc., Searle Medical Products SA Inc., Akwell Industries, Inc., Briggs Corporation, Searle Medical Products (Canada) Inc., Industrias Apson, S. A. de C.V., Puerto Rico Hospital & Medical Supply Co., Inc., Laboratorio Optico Franklin, S.A., Lentes Franklin, S. A., Lentes Franklin del Centro, S.A., Lentes Franklin de Guadalajara, S.A., Lentes Franklin de Monterrey, S.A., Lentes Franklin de Tampico, S.A., Lentes Franklin de Tijuana, S.A., Vision Center of Puerto Rico, Searle Malaysia, Searle Singapore, G. D. Searle Argentina S.A.C.I., G. D. Searle & Co. of Canada, Ltd., Searle de Venezuela, C.A., G. D. Searle Australia Pty. Ltd., Searle Nominees, Ltd., Searle Nuclear do Brazil-Equipamentos Cientificos Ltda., Searle do Brazil S. A., G. D. Searle (Thailand) Ltd., G. D. Searle International (Hong Kong) Ltd., Marupi-Searle Co., Ltd., Searle Japan K.K., Promotora Ipsa, Searle de Mexico S.A. de C.V., G. D. Searle (New Zealand) Ltd., Laboratoires Searle S.A., Will Ross N. V., G. D. Searle A/S, Svend Andersen Plastik Industri A/S, Gold Cross (Hospital Supplies) Ltd., Gold Cross (Subsidiary Holdings) Ltd., G. D. Searle & Co. Ltd., Searle de Frances S.A., Laboratoires Searle, G. D. Searle GmbH, Searle Medical GmbH, Searle EPE, Searle Iberica S. A., G. D. Searle A. B., Searle S. A., Searle Oy., Searle Norge A/S, Searle Laboratories (Pty.) Ltd., G. D. Searle (South Africa) Pty. Ltd., Searle Bangladesh Ltd., Searle India Ltd., Sarala, Searle Pakistan Ltd., Searle Medical B. V., Van Gulijk Instrumenten B. V., G. D. Searle Unterstutzungskasse GmbH, G. D. Searle (Nederland) B. V., Keip Optiek Haarlem B. V., Kodswald A. G., N. V. Future Optics S. A., Inter Lunet B. V., Brilmij Holding B. V., Brilmij Maatschappij Tot Exploitatie Van Optiekbedrijven B. V., Bexop Exploitatiemaatschappij B. V., Searle & Co., Continental Fisons S. A., Searle Philippines, Texas State Optical, Inc., Laboratil S. A. Industrias Pharmaceuticas, Pearl Vision Center, Ltd., Gould & Hershman (Opticians) Ltd., Gould & Hershman (Opticians) (Northern) Ltd., House of Vision, Ltd., Searle Medical S.A., Searle Zambia, Ltd., Pearle Vision Center Inc., Searle Optical Inc., Will Ross Foundation, Inc., Refrigerants & Chemicals (Queensland) Pty. Ltd., E. & W. T. Williams (Holdings) Pty. Ltd., E. & W. T. Williams (Manufacturing) Pty. Ltd., Refrigerants & Chemicals Pty. Ltd., Capri Pools Pty. Ltd., Keunwha-Searle Limited, Kelsar S. A., G. D. Searle Hamburg GmbH, E. Montlake (Opticians) Ltd., Oedip-Cerem S.A., Oedim S.A., Sedim, S.A., and Cedip GmbH.

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported at 628 F.2d 801 and is reproduced in the Petition for Certiorari (pp. 1a-25a). The judgment of the Court of Appeals appears in the Petition for Certiorari (pp. 26a-27a) and in the Joint Appendix (pp. 74a-75a). The opinion of the United States District Court for the District of New Jersey is reported at 447 F. Supp. 903 and is reproduced in both the Petition for Certiorari (pp. 28a-49a) and in the Joint Appendix (pp. 26a-48a).

JURISDICTION

The judgment of the Third Circuit was entered on July 23, 1980 (Pet. for Cert. 26a-27a). A timely petition for a writ of certiorari was filed on October 20, 1980 and granted on April 20,

1981. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

United States Constitution, Amendment XIV, §1:

> "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

United States Constitution, Art. 1, §8, Cl. 3:

> "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several states,...."

New Jersey Statutes Annotated, 2A:14-22:

> "If any person against whom there is any of the causes of action specified in sections 2A:14-1 to 2A:14-5 and 2A:14-8, or if any surety against whom there is a cause of action specified in any of the sections of article 2 of this chapter, is not a resident of this state when such cause of action accrues, or removes from this state after the accrual thereof and before the expiration of the times limited in said section, or if any corporation or corporate surety not organized under the laws of this state, against whom there is such a cause of action, is not represented in this state by any person or officer upon whom summons or other original process may be served, when such cause of action accrues or at any time before the expiration of the times so limited, the time or times during which such person or surety is not residing within this state or such corporation or corporate surety is not so represented within this state shall not be computed as part of the periods of time within which such an action is required to be commenced by the section. The person entitled to any such action may commence the same after accrual of the cause therefor, within the period of time limited therefor by said section, exclusive of such time or times of nonresidence or nonrepresentation."

New Jersey Statutes Annotated, 14A:13-2:

"* * *

"(2) A foreign corporation which receives a certificate of authority under this act shall, until a certification of revocation or of withdrawal is issued as provided in this act, enjoy the same, but no greater, rights and privileges as a domestic corporation organized for the purposes set forth in the application pursuant to which such certificate of authority is issued; and, except as in this act otherwise provided, shall be subject to the same duties, restrictions, penalties and liabilities now or hereafter imposed upon a domestic corporation of like character. . . ."

New Jersey Statutes Annotated, 14A:13-3:

"(1) No foreign corporation shall have the right to transact business in this State until it shall have procured a certificate of authority so to do from the Secretary of State. A foreign corporation may be authorized to do in this State any business which may be done lawfully in this State by a domestic corporation, to the extent that it is authorized to do such business in the jurisdiction of its incorporation, but no other business. . . ."

New Jersey Statutes Annotated, 14A:13-4:

"(1) To procure a certificate of authority to transact business in this State, a foreign corporation shall file in the office of the Secretary of State an application executed on behalf of the corporation setting forth

"(a) the name of the corporation and the jurisdiction of its incorporation;

"(b) the date of incorporation and the period of duration of the corporation;

"(c) the address of the main business or headquarters office of the corporation;

"(d) the address of the registered office of the corporation in this State, and the name of its registered agent in this State at such address, together with a statement that the registered agent is an agent of the corporation upon whom process against the corporation may be served; and

"(e) the character of the business it is to transact in this State, together with a statement that it is authorized to transact such business in the jurisdiction of its incorporation.

* * *

"(3) Upon the filing of the application, the Secretary of State shall issue to the foreign corporation a certificate of authority to transact business in this State."

New Jersey Court Rule 4:4-4:

"Service of summons, writs and complaints shall be made as follows:

* * *

"(c) Corporations, Partnerships, and Associations.

"(1) Corporations. Upon a domestic or foreign corporation, by serving, in the manner prescribed in paragraph (a), either an officer, director, trustee, or managing or general agent; or any person authorized by appointment or by law to receive service of process on behalf of the corporation; or the person at the registered office of the corporation in charge thereof. If service cannot be made upon any of the foregoing, then it may be made upon the person at the principal place of business of the corporation in this State in charge thereof, or if there is no place of business in this State, then upon any servant of the corporation within this State acting in the discharge of his duties. If it appears by affidavit of plaintiff's attorney or of any person having knowledge of the facts that after diligent inquiry and effort personal service cannot be made upon any of the foregoing and if the corporation is a foreign corporation, then, consistent with due process of law, service may be made by mailing, by registered or certified mail, return receipt requested, a copy of the summons and complaint to a registered agent for service, or to its principal place of business, or to its registered office."

New Jersey Statutes Annotated, 2A:14-2:

"Every action at law for an injury to the person caused by the wrongful act, neglect or default of any person within this state shall be commenced within 2 years next after the cause of any such action shall have accrued."

STATEMENT OF THE CASE

G. D. Searle & Co. Petitioner G. D. Searle & Co. ("Searle") is a Delaware corporation which has its principal place of business in Skokie, Illinois. During the period covered by this case, it was engaged in the business of manufacturing and selling pharmaceutical products.[1]

Searle's products are sold in every State. However, because of the nature of Searle's business, there are many States in which Searle does not have a production facility, a distribution center, or an office and in which Searle is not registered to do business. Searle's products are produced at facilities located at different sites in the United States. Searle's products then are sold to independent wholesalers, hospitals, and clinics who, in turn, distribute the products to retail pharmacies for sale to the ultimate consumers. Searle thus is not itself engaged in either the wholesale distribution or the retail distribution of its products. In those States in which Searle does not have a facility or office, its business activities are limited, first, to shipping its products, through the channels of interstate commerce, to independent wholesalers, hospitals, and clinics and, second, to activities designed to promote use of its products.

Prior to December 30, 1960, Searle transacted business in New Jersey.[2] Thus, Searle had then been required, under the New Jersey statutes that regulates corporations that "transact business" in New Jersey, to file certain reports with the New Jersey Secretary of State, to appoint a registered agent in New Jersey upon whom process against the corporation could be served, and thereby to obtain a "certificate of authority" which, by the terms of the statute, subjected it the "same duties" imposed on domestic cor-

[1]After the period covered by this case, Searle transferred some of these functions to its subsidiaries. For example, since 1978, Enovid, the product at issue in this case, has been manufactured by Searle & Co., a subsidiary located in Puerto Rico.

[2]Although this is not reflected in the record, Searle had had a distribution center and an office in New Jersey during that period.

porations. *See* N.J.S.A. 14A:13-2, 13-4. Searle then made the requisite filings and had a registered agent to accept process.

In 1960, Searle ceased the New Jersey activities that had subjected it to the registration statute, and on December 30, 1960, it terminated its registration in New Jersey (Cert. Pet. 30a). Thereafter, as the District Court found, Searle's activities in New Jersey have been limited to shipping its products from out-of-state locations to independent New Jersey wholesalers, hospitals, or clinics and to promoting its products (Cert. Pet. 35a). In connection with its promotional efforts, Searle has employed a number of "detailmen" who work and in many instances live in New Jersey (Cert. Pet. 30a). The detailmen's function is solely to talk to New Jersey doctors, generate good will for the company, and encourage doctors to prescribe Searle's products (Cert. Pet. 30a). The detailmen have no power to make contracts or place orders (Cert. Pet. 30a). Because Searle has no offices in New Jersey, these detailmen operate out of their homes and they report to officials at Searle's headquarters in Skokie, Illinois (Cert. Pet. 35a).

Although Searle does not engage in intrastate business in New Jersey, it has conceded that it is amenable to long arm jurisdiction in New Jersey courts in personal injury actions involving Searle products that were purchased and used in New Jersey.

The Present Suit. In the present suit, respondents Susan Cohn and her husband[3] claim that Searle is liable for the damages they allegedly suffered as a result of Mrs. Cohn's use of Enovid, an oral contraceptive manufactured by Searle. The Complaint alleges that Mrs. Cohn began using Enovid in approximately June, 1963, that she suffered a stroke on December 22, 1963, and that she and her husband each incurred damages as a result of this stroke.

The suit was filed in New Jersey Superior Court on January 29, 1974, more than *ten years* after Mrs. Cohn's stroke. Respondents

[3]Respondent Walter Cohn is representing both himself *pro se* and his wife in this suit.

obtained jurisdiction over Searle by mailing a copy of the summons and the complaint to Searle's headquarters in Skokie, Illinois, pursuant to New Jersey's long-arm rule. It is undisputed that Searle is subject to *in personam* jurisdiction in New Jersey in this case.

After removing the case to the United States District Court, Searle moved for summary judgment on the ground the suit was barred by the two-year New Jersey statute of limitations that applies to such personal injury suits. *See* N.J.S.A. 2A:14-2. Because New Jersey law provides that a cause of action does not accrue until a plaintiff has reason to know of "the existence of a cause of action" against a particular defendant, *see Burd* v. *New Jersey Telephone Co.*, 76 N.J. 284, 386 A.2d 1310, 1314-15 (1978), Searle acknowledged in the trial court that the two-year statute of limitations may not have begun running on the date of Mrs. Cohn's stroke, December 22, 1963. Searle argued, however—and the District Court later held—that respondents had had reason to know that they had a cause of action against Searle no later than 1970 and that, if applicable, the two year statute of limitations will bar this suit.[4]

Respondents, however, argued that under New Jersey's "tolling statute" (N.J.S.A. 2A:14-22) Searle could not claim the benefit of New Jersey's statute of limitations. This statute provides that where "a corporation . . . not organized under the laws of this State . . . is not represented in [New Jersey] by any person or other officer upon whom process may be served" the statute of

[4]In the trial court, respondents initially argued that, although they had diligently examined the relevant literature, they had not discovered their cause of action against Searle until 1974. However, when pretrial discovery established that they had discovered their cause of action in 1969 or 1970, respondents *conceded* this point (Joint Appendix ("JA") p. 17). Respondents then attempted to avoid the statute of limitations by urging—contrary to their earlier contentions—that Mrs. Cohn had been "insane" prior to 1974. The District Court rejected both of respondents' claims (JA 59, 64).

limitations will not run in any cause of action against that corporation. N.J.S.A. 2A:14-22. Respondents contended that Searle was not "represented" in New Jersey during the relevant period because it had no office or officer in the State and had not designated an agent to accept service of process.

Searle argued that this tolling provision could not be applied to it in the present suit. First, Searle urged that the tolling statute was inapplicable to it as a matter of state law. It argued it was "represented" in New Jersey because it was amenable to personal jurisdiction in New Jersey under New Jersey's long-arm provisions. Searle further pointed out that under the New Jersey rule governing service of process (Rule 4:4-4), service can be made upon "any servant of the corporation within the State acting in the discharge of his duties." Because its New Jersey detailmen were such servants of Searle, it argued it was represented in New Jersey by many persons "upon whom process may be served."[5] Second, in any case, Searle maintained that it would violate the Commerce Clause, the Due Process Clause, and the Equal Protection Clause of the United States Constitution if a State could deny the benefit of its statute of limitations to foreign corporations that are amenable to *in personam* jurisdiction in that suit merely because the corporation had not consented to jurisdiction in *all* suits in the State by registering an agent in the State to receive process.

The District Court's Decision. The District Court rejected Searle's state law claims that Searle was "represented" in the State (Cert. Pet. 33a-43a). In determining the meaning of "representation," the District Court held that the intent of the legisla-

[5]Of course, like long arm service or like service on an officer of a corporation, service on detailmen would only be effective to subject Searle to *in personam* jurisdiction in New Jersey in those cases in which the "minimum contacts" test is satisfied. *See International Shoe Co.* v. *Washington*, 326 U.S. 310, 317 (1945); Restatement of the Law (Second), Conflict of Laws, §42, Comment e (1971).

ture must be determined in light of the circumstances in existence at the time the tolling statute was enacted in 1949. New Jersey did not then have a long-arm rule, and the only means of serving a foreign corporation was service on an officer, director, or appointed agent. The District Court thus held the New Jersey legislature intended that a foreign corporation that did not have an officer, director, or registered agent in the State would not be treated as "represented" in New Jersey, even though it was subject to long-arm jurisdiction and had other servants in the State who could be served.

However, the District Court held that the tolling provision was unconstitutional. The District Court concluded that the statute violated the Equal Protection Clause because it arbitrarily discriminated against unrepresented foreign corporations that are subject to long-arm jurisdiction. In view of the fact there was no long arm jurisdiction in 1949, the District Court reasoned that the sole purpose of the New Jersey tolling statute, as enacted in 1949, was to preserve a plaintiff's cause of action where the defendant is not amenable to suit in New Jersey. Because unrepresented corporations that are subject to long-arm jurisdiction are now no less amenable to process than are domestic corporations or registered foreign corporations, the Court concluded that discrimination against such unregistered foreign corporations is irrational (Cert. Pet. 44a–49a).

The District Court further concluded that the State could not, under the Commerce Clause, deny valuable rights like the protection of the statute of limitations to foreign corporations engaged in interstate commerce simply because they had not appointed an agent in the State to accept service of process (Pet. for Cert. 44a-45a n.17). The Court thus rejected respondents' argument that the statute legitimately furthered a proper legislative purpose of forcing all foreign corporations to register in New Jersey. Quite apart from the fact it held such an objective would be unconstitutional,

the Court stated it found no evidence that the statute had any such purpose.

The Court of Appeals Decision. Respondents appealed the dismissal of the suit to the Court of Appeals for the Third Circuit. Before the Third Circuit rendered its decision, the New Jersey Supreme Court issued a decision that addressed many of the points that had been raised. *Velmohos* v. *Maren Engineering Corp.*, 83 N.J. 282, 416 A.2d 372 (1980). In reliance on this decision, the Court of Appeals reversed the District Court.

The Court of Appeals held that a foreign corporation is not "represented" in New Jersey, even though it is subject to long arm jurisdiction because the New Jersey Supreme Court had expressly rejected this argument in *Velmohos*. The Court of Appeals further held that Searle is not "represented" in New Jersey within the meaning of the tolling statute even though it had servants in the state upon whom service could be made. Like the District Court, the Court of Appeals determined the legislative intent on the basis of circumstances in existence in 1949. Because service on detailmen was not permitted in 1949, the Court of Appeals held their presence in New Jersey did not constitute "representation" under the tolling statute (Cert. Pet. 15a-17a).

Second, the Court of Appeals held the tolling statute is constitutional because it concluded the statute furthers legitimate state objectives (Cert. Pet. pp. 18a-25a). Although there had been no long-arm rule in New Jersey in 1949, the Court concluded that the tolling provision had the "legitimate objective" of forcing foreign corporations to appoint agents in New Jersey and thereby making it easier for plaintiffs prosecuting suits in New Jersey courts to obtain jurisdiction than if they were able to rely solely upon long-arm jurisdiction.

Specifically, the Court of Appeals noted that the New Jersey Supreme Court, in *Velmohos*, had identified three reasons why long-arm service is "more difficult and time consuming to achieve

than service within the State" and why the tolling statute will have the effect of simplifying a plaintiff's task (Cert. Pet. 21a-23a). First, under the New Jersey long-arm rule, "extra territorial service is not simply an alternative to service in the State" because plaintiffs may only resort to such service if they first ascertain that service cannot be made in the State. Second, a plaintiff who resorts to long-arm service has the burden of gathering sufficient information to satisfy a court that the long-arm jurisdiction is consistent with due process. Third, there may be cases in which unrepresented foreign corporations are more "difficult to locate" than represented corporations or domestic corporations. *See also Velmohos, supra*, 416 A.2d at 380-81. The Court of Appeals concluded that the State's interest in protecting a plaintiff against any possible difficulty in locating and obtaining personal jurisdiction in New Jersey over a foreign corporation was sufficient to satisfy the Due Process and Equal Protection Clauses. The Court of Appeals did not specifically address Searle's Commerce Clause claim.

A timely petition for a writ of certiorari to review the Court of Appeals' decision was filed on October 20, 1980. This petition was granted on April 20, 1981.

SUMMARY OF ARGUMENT

The New Jersey tolling statute bars unregistered foreign corporations from raising the bar of the statute of limitations even where, as here, the corporation was at all relevant times amenable to long-arm jurisdiction. The effect of this statute is to require foreign corporations, like Searle, that are not "doing business" in New Jersey to waive one of two substantial rights.

On the one hand, if the corporation refuses to register an agent to accept service of process in New Jersey, the corporation will be forever denied the right to plead the statute of limitations that applies to all other defendants. In cases in which Searle is amenable to suit in New Jersey, an action could then be brought against

it at any time, subject only to the convenience, whim, or caprice of the plaintiff.

On the other hand, if the foreign corporation wants to obtain the protection and certainty of the statute of limitations, the corporation will have to register an agent. By so doing, the corporation would be consenting to jurisdiction and venue in New Jersey in any and all suits, including "foreign" causes of action that have no relation to New Jersey and that would not satisfy the "minimum contacts" test of *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945), and its progeny. *See Pennsylvania Fire Ins. Co.* v. *Gold Issue Mining Co.*, 243 U.S. 93 (1917). Furthermore, the only way a corporation may, under New Jersey law, register an agent in New Jersey is to qualify to do business in New Jersey, subject itself to duties that apply to domestic New Jersey corporations, and thereby waive its immunity from state licensing restrictions.

To avoid these severe burdens, nearly every state has held, as a matter of state law, that comparable tolling statutes are inapplicable to foreign corporations that are amenable to long-arm jurisdiction. By refusing to follow these decisions, New Jersey has violated Searle's constitutional rights.

First, the New Jersey tolling statute violates the Commerce Clause. Searle's activities in New Jersey are limited to shipping its products, through interstate commerce, to independent middlemen located in the state and to sending "drummers" into the state to encourage doctors to prescribe its products. This Court has repeatedly held that such interstate enterprises are *per se* immune from general police power regulations. States may not require these foreign corporations to register agents or qualify to do business. Nor may they deny these corporations important state rights in litigation merely because they have failed to comply with such requirements. *Sioux Remedy Co.* v. *Cope*, 235 U.S. 197 (1914); *see Allenberg Cotton Co.* v. *Pittman*, 419 U.S. 20 (1974).

In any event, the New Jersey tolling statute is invalid under the Commerce Clause because the burden on interstate commerce is clearly excessive in relation to the local benefits. *See Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). To the extent it advances any legitimate local interests, these could plainly be achieved by means that would have a lesser burden on commerce.

The state interest in sparing plaintiffs the burden of proving that particular suits against foreign corporations in New Jersey are consistent with the Due Process Clause has been held to be *per se* illegitimate. *See Shaffer* v. *Heitner*, 433 U.S. 186, 211 (1977). The state interest in simplifying service of process for plaintiffs is too minor to justify the burden on commerce. In any case, it can be achieved directly, without interfering with interstate commerce. Finally, the interest in protecting plaintiffs who cannot locate out of state defendants can readily be achieved by alternative means: a narrowly drawn statute that prevents the statute of limitations from running only when the defendant cannot be found.

Second, the New Jersey statute violates the Due Process Clause. It requires foreign corporations to forego the benefit of the statute of limitations unless they waive their right, under the Due Process Clause, not to be sued in New Jersey in cases in which the "minimum contacts" test of *International Shoe* cannot be satisfied. None of the putative objectives of the New Jersey law are possibly sufficient to justify this unconstitutional condition.

Finally, the statute violates the Equal Protection Clause. It singles out foreign corporations that do not do business in New Jersey and subjects them to a unique burden. Because this statute burdens fundamental constitutional rights and applies only to entities that could not be represented in the New Jersey legislature, it must satisfy a heightened standard of review to be constitutional. Here, none of the three objectives that have been identified for the statute are sufficient to justify the discrimination against

unregistered foreign corporations, like Searle, that are amenable to suit in New Jersey—under *any* standard of review. Indeed, if the purpose of the statute is to protect plaintiffs against the difficulties of making extraterritorial service, the statute is irrational on its face because it tolls the statute of limitations *indefinitely*, even when no difficulties are encountered by the plaintiff. Moreover, the sole actual purpose of the New Jersey legislature that enacted the law was to preserve a plaintiff's cause of action when the defendant could not be sued in New Jersey. Because Searle was here amenable to suit in New Jersey at all relevant times, the discrimination against it does not serve *any* purpose.

ARGUMENT

Introduction

Like most States, New Jersey has long had a statute that tolls the statute of limitations during any period in which the defendant to a cause of action did not reside in the State. It also has long had a statute that requires corporations that "transact business" in New Jersey to register in the State, to assume duties of domestic corporations, and to appoint agents to accept service of process in any suit brought in a New Jersey court. *See* N.J.S.A. 14A: 13-1, *et seq.*

The original version of the New Jersey tolling statute[6] appears, by its terms, to have denied the benefit of the statute of limitations to all corporations not chartered by the State of New Jersey, even including those registered to do business there.[7] *See Velmohos* v. *Maren Engineering Corp.*, *supra*, 416 A.2d at 376-77. In 1949,

[6]Prior to 1949 the statute simply provided that the statute of limitations would never run against "any person" who "is not a resident of" New Jersey, without making any specific reference to corporations. *Velmohos*, *supra*, 216 A.2d at 376.

[7]Although the original version of the statute is not in issue, it appears that its application to a foreign corporation would have been a flagrant violation of the Equal Protection Clause and the Commerce Clause.

the New Jersey legislature enacted the present version of the tolling statute. It extends the benefit of the statute of limitations to corporations that are "not organized" in New Jersey but that are "represented in this State by any person or officer upon whom summons or any other original process may be served." The only available legislative history is a statement accompanying this 1949 amendment which indicates that the statute was intended to benefit those foreign corporations that are "licensed to do business in New Jersey." *See Velmohos* v. *Maren Engineering Corp.*, *supra*, 416 A.2d at 377, *quoting* Statement Accompanying New Jersey Assembly Bill No. 467 (1949).

The New Jersey tolling statute, as amended in 1949, created some potential for the imposition of unique burdens on foreign corporations that did not "transact business" in New Jersey. In 1949, however, there were few, if any, instances in which such burdens could in practice have been imposed. The critical fact is that New Jersey did not then have a long-arm statute or any other provision for the assertion of *in personam* jurisdiction over an unregistered foreign corporation. There thus was then no basis for a New Jersey court to obtain the jurisdiction that would allow it to apply the tolling statute to the prejudice of such interstate corporations, and there was little risk that a foreign corporation could ever be so burdened.

However, in 1958, the New Jersey Supreme Court promulgated a rule that authorizes long-arm jurisdiction to the "uttermost limits permitted by the United States Constitution." *Avdel Corp.* v. *Mecure*, 58 N.J. 264, 268, 277 A.2d 207, 209 (1971). This rule indisputably affords New Jersey courts *in personam* jurisdiction over foreign corporations, like Searle, where the corporation's activities in interstate commerce and the litigation are sufficiently related to New Jersey to satisfy the "minimum contacts" test of *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945), and its progeny.

The adoption of the New Jersey long-arm rule and the *Velmohos* holding that unregistered foreign corporations may never claim the benefit of the New Jersey statute of limitations impose a serious burden on companies that do not have facilities or offices in New Jersey but that will be amenable to long-arm jurisdiction in particular cases. In effect, the tolling statute requires them to relinquish one of two substantial rights. First, if the corporation declines to register an agent in New Jersey, it will be totally denied the right to claim the protection of the statute of limitations applicable to all other defendants. If it is amenable to long-arm jurisdiction in New Jersey in a case, it will therefore be subject to suit in New Jersey anytime.[8]

Second, if the corporation submits to the State's coercion and registers an agent, the corporation will waive substantial rights under the Due Process and Commerce Clauses. Although the appointment of an agent will not affect Searle's amenability to suit where, as in this case, long-arm jurisdiction can constitutionally be exercised, there are a great many suits in which there would be no relationship between "the forum and the litigation" and in which, because Searle has almost no relationship with New Jersey, personal jurisdiction could not be exercised over it there. *Compare Rush* v. *Shavchuk*, 444 U.S. 320, 327, 329 (1980); *Shaffer* v. *Heitner*, 433 U.S. 186, 204 (1977). But by registering an agent to accept process, Searle would be consenting to *in personam* jurisdiction and venue in New Jersey Courts in *all* cases, including those in which jurisdiction could not otherwise be exercised. *See Pennsylvania Fire Ins. Co.* v. *Gold Issue Mining Co.*, 243 U.S. 93 (1917) (appointment of agent in a state constitutes consent to jurisdiction in foreign causes of action); *Neirbo* v. *Bethlehem Shipbuilding Corp., Ltd.*, 308 U.S. 165 (1939) (appoint-

[8]Although a defendant could attempt to dismiss some such suits under the doctrine of laches, *see Velmohos*, *supra* 416 A.2d at 378 n.10, this doctrine does not even begin to provide the certainty and protection from suit that the statute of limitations affords. *cf. Holmberg* v. *Armbrecht*, 327 U.S. 392 (1946).

ment of agent waives objections to venue); *see also National Equipment Rental, Ltd.* v. *Szukhent*, 375 U.S. 311 (1964); *Litton Industrial Systems, Inc.* v. *Kennedy Van Saun Corp.*, 117 N.J. Super. 52, 283 A.2d 551, 555-56 (Law Div. 1971); Restatement of Conflicts of Laws (Second), §34, Comment f (1971); *id.*, §44.[9]

Further, New Jersey law does not contain any provision that permits a foreign corporation to register an agent to accept service of process in New Jersey, without also qualifying the corporation to do business in the State. Thus, the only way Searle can register an agent is to obtain a "certificate of authority to transact business" in New Jersey. *See* N.J.S.A. 14A:4-1 *et. seq; id.*, 13-4. By qualifying to do business, Searle would subject itself to requirements of annual reporting of business activities, franchise tax liability, and, by the terms of the statute, "to the same duties, restrictions, penalties, and liabilities . . . imposed on domestic corporations." N.J.S.A. 14A:13-2. In short, Searle would thus also have to waive its right not to be treated as a domestic New Jersey corporation to obtain the benefit of its statute of limitations.

Because of these extreme burdens and anomalies, nearly every other State court has held, as a matter of state law, that comparable tolling statutes are inapplicable where, as here, the absent defendant was amenable to suit in the state at all relevant times.[10]

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[9] In New Jersey, the designation of an agent to accept service of process constitutes a foreign corporation's consent to jurisdiction in New Jersey in all cases, including ones that are unrelated to New Jersey. As the court stated in *Litton Industrial Systems, Inc.* v. *Kennedy Van Saun Corp.*, *supra*, designation of an agent is consent to suit in New Jersey, "even if it be established that the contract . . . sued on was unrelated to defendant's business activities in [this] state." *See* 283 A.2d at 555-56. This follows, *inter alia*, from the fact that a corporation that registers in New Jersey thereby assumes, under the terms of the statute, the "same duties" imposed on corporations that are incorporated in New Jersey. *See* N.J.S.A. 14A:13-2.

[10] As the District Court recognized, of the approximately forty-two state courts that have considered the issue whether their tolling statutes

(Footnote continued on following page.)

These holdings avoided serious constitutional questions. However, because New Jersey has refused to follow these decisions, the constitutional questions are squarely presented. Searle submits that the New Jersey tolling statute is, as applied to it, invalid under the Commerce Clause, the Due Process Clause, and the Equal Protection Clause of the United States Constitution.

I. The New Jersey Tolling Statute Imposes An Impermissible Burden On Interstate Commerce.

The Commerce Clause creates, by its own force, "an area of trade free from interference by the States" and stands as "a limitation upon the power of the States." *Great Atlantic & Pacific Tea Co.* v. *Cottrell*, 424 U.S. 366, 370-71 (1976); *see Southern Pacific Co.* v. *Arizona*, 325 U.S. 761, 767 (1945). The criteria for assessing the validity of State legislation under the Commerce Clause are well established. First, there are certain state statutes that impose burdens on interstate commerce that are so substantial, direct, or unjustified that this Court has applied a virtual *per se* rule of invalidity. *See Philadelphia* v. *New Jersey*, 437 U.S. 617, 624 (1978); *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142 (1970); *Allenberg Cotton Co.* v. *Pittman*, 419 U.S. 20 (1974). Second, even if a State law regulates "even-handedly" and imposes only indirect, incidental burdens on interstate commerce, the law will be invalid if the "burden imposed on interstate commerce is clearly excessive in relation to the putative local benefit." *Pike* v. *Bruce Church, Inc.*, *supra*, 397 U.S. at 142; *see also Minnesota* v. *Clover Leaf Creamery Co.*, ___ U.S. ___, 49 L.W. 4111, 4115 (Jan. 21, 1981). In such cases, "if a legitimate local purpose is found, then the question is one of degree. . . . The extent of the burden that will be tolerated" then depends "on the nature of the local interest involved, and on whether it could be promoted

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are inapplicable to claims against nonresidents who have continuously been amenable to long arm jurisdiction, thirty eight have rejected the position of the New Jersey Supreme Court. Cert. Pet. 49a n.21. *See* JA pp. 18a-25a; Annotation, 55 A.L.R.3d 1158 (1974).

as well with a lesser impact on interstate activities." *Pike, supra* 397 U.S. at 142; *Accord, Kassel* v. *Consolidated Freightways*, ___ U.S. ___, 49 L.W. 4328, 4330 (March 24, 1981). The New Jersey tolling statute is invalid under both these lines of Commerce Clause decisions.

A. The New Jersey Law Is Per Se Invalid.

It has been settled for nearly a century that it is a *per se* violation of the Commerce Clause for a State to apply general legislative restrictions to enterprises whose sole activities within the State's borders have consisted of sending representatives to "drum up" business and of shipping goods through the channels of interstate commerce directly to purchasers located in the State. *Sioux Remedy Co.* v. *Cope*, 235 U.S. 197 (1914); *International Textbook Co.* v. *Pigg*, 217 U.S. 91 (1910); *see Allenberg Cotton Co.* v. *Pittman*, 419 U.S. 20 (1974); *Nippert* v. *City of Richmond*, 327 U.S. 416 (1946); *Robbins* v. *Shelby County*, 120 U.S. 489 (1887). These decisions recognize that the zone of free trade established by the Commerce Clause would be a meaningless abstraction if a State could impose obligations of domestic corporations on enterprises merely because they engaged in the State in incidental activities that are integral to interstate commerce. Enterprises have a right to structure their businesses and immunize themselves from burdensome local legislative restrictions. Indeed, this Court has thus stated that it is clear "under the authority of the so-called 'drummer cases,' [that a pharmaceutical company] is free to send salesmen into New Jersey to promote this interstate trade without interference from regulations imposed by the State." *Eli Lilly & Co.* v. *Sav-On Drugs*, 366 U.S. 276, 278-79 (1961) (citations omitted). The corollary to these principles is that states may not deny such foreign corporations important rights in litigation merely because they have failed to comply with such regulations.

In *Sioux Remedy Co.* v. *Cope*, *supra*, for example, a South Dakota statute had denied the right to file suits in South Dakota

courts to foreign corporations that had not complied with a statute requiring the appointment of resident agents to accept service of process and the registration of the corporation. This Court held that the statute could not constitutionally be applied to bar an Iowa corporation that had shipped goods to a South Dakota purchaser from bringing suit in a South Dakota court. Because the corporation's activities fell within the constitutional zone of free trade, this Court held the State could not "obstruct or hamper" the corporation in the "legitimate purpose of [interstate] commerce" of attempting to take advantage of the same rights to litigate in the courts of the state as are available to all other litigants. 235 U.S. at 204. In so holding, this Court further emphasized the severe burdens the South Dakota statute imposed. Not only did this Court recognize the serious risk to free trade inherent in a requirement that such a corporation be licensed, but it also held that the rule that conditioned a corporation's right to sue on the appointment of a resident agent was "particularly burdensome" and could subject corporations engaged in interstate commerce to "serious hazards." *Id.*, at 205.

> "[I]t requires the corporation to subject itself to suit to the jurisdiction of the courts of the State in general as a prerequisite to suing in any of them; . . . it withholds the right to sue even in a single instance *until the corporation renders itself amenable to suit in all the courts of the State by whosoever chooses to sue it there.*" 235 U.S. at 205 (emphasis added).[11]

Allenberg Cotton Co. v. *Pittman*, 419 U.S. 20 (1974), is a more recent application of these principles. There this Court followed the reasoning of *Sioux Remedy* and held that Mississippi could not deny the right to sue in state court to a foreign corporation

[11] *Sioux Remedy* is one of the many decisions that recognize that an interstate enterprise's interest in being subjected to suit only in appropriate forums is protected by the Commerce Clause as well as by the Due Process Clause. *See, e.g., Davis* v. *Farmer's Co-operative Equity Co.*, 262 U.S. 312, 317-18 (1923); *Scanapico* v. *Richmond F.P.R. Co.*, 439 F.2d 17, 25-28 (2nd Cir. 1970) (en banc).

that purchased cotton in Mississippi exclusively for sale in interstate commerce merely because the corporation had not qualified to do business in Mississippi. *Accord, Dahnke-Walker Co.* v. *Bondurant*, 257 U.S. 282 (1921).

The application of these principles to the present case is clear. First, Searle's activities in New Jersey unquestionably fall within the zone of free trade that is immune from general police power restrictions. Searle has no facility or office in New Jersey. Its detailmen, who work out of their homes and report to Searle's Skokie office, are engaged in strictly promotional activities in New Jersey and are not empowered to enter into contracts or to take orders. The balance of Searle's New Jersey related activities consists of shipping its products from out of State, through the channels of interstate commerce, directly to independent wholesalers, hospitals, and clinics located in New Jersey.[12] Indeed, the present case is far clearer on this point than was *Allenberg*. In contrast to the facts of this case, the foreign corporation involved in *Allenberg* had regularly executed and concluded purchases of cotton in that state, maintained a perpetual revolving inventory of cotton in Mississippi, and thus appears to have had an extensive purely intrastate component to its interstate business.

Second, the New Jersey tolling statute has the same impermissible effect as did the statutes invalidated in *Sioux Remedy* and *Allenberg*. It denies Searle an important right in litigation unless Searle subjects itself to the "severe hazards" of making itself amenable to suit in any and all cases in New Jersey. Indeed, the New Jersey statute is more harsh in its operation than were the statutes in *Allenberg* and *Sioux Remedy*. In those cases, the sole

[12]Perhaps the clearest demonstration of the basic point is that, because Searle has no office or facility in New Jersey and has no employees in New Jersey with the power to enter into contracts or take orders, it does not even "transact business" within the meaning of New Jersey's registration statutes. *See Materials Research Corp.* v. *Metron*, 64 N.J. 74, 312 A.2d 147 (1973); *compare, Eli Lilly & Co.* v. *Sav-On Drugs, Inc.*, 366 U.S. 276 (1961).

effect of the statutes was to deny foreign corporations the benefit of access as a plaintiff to one of several possible forums.[13] They did not preclude them from obtaining a favorable judgment. In contrast, because it operates on defendants, the New Jersey tolling statute absolutely denies Searle the right, enjoyed by all other litigants, to have a suit dismissed under the statute of limitations and thus obtain a judgment in its favor. Furthermore, because there is no other way for Searle to appoint a registered agent, the only way it can avoid the tolling statute is to assume, by the statutes terms, the "same duties" of corporations incorporated in New Jersey. N.J.S.A. 14A: 13-2. For all these reasons, the tolling statute is invalid *per se*.

B. The New Jersey Statute Is Invalid Because The Burden Imposed On Interstate Commerce Is Disproportionate To Any Legitimate Local Benefit.

Second, even if the New Jersey tolling statute were not invalid *per se*, the statute is unconstitutional because its burden on interstate commerce "is clearly excessive in relation to the putative local benefits." *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142 (1970); *see Raymond Motor Transportation, Inc.* v. *Rice*, 434 U.S. 429, 441 (1978). There is no "legitimate local purpose" that the New Jersey statute promotes which is sufficient to justify the statute's adverse effect on interstate commerce. Indeed, to the extent the New Jersey law advances any permissible local objectives, these can readily be attained by alternative means that will entirely avoid the burdens on commerce.

1. The Burden On Interstate Commerce Is Substantial.

This Court has held that statutes like the one at issue here have a "particularly burdensome" effect on interstate commerce.

[13]Even if there were any doubt about the claimant's access to federal court or other state courts—which there was not—the fact remained the foreign corporation could have assured there would be available forums by inserting forum selection clauses into the sales contracts. *Cf. National Equipment Rental, Ltd.* v. *Szukhent*, 375 U.S. 311 (1964).

Sioux Remedy Co. v. *Cope*, *supra*, 235 U.S. at 204-05. By conditioning a foreign corporation's right to plead the statute of limitations on its appointment of a resident agent, New Jersey has withheld a critical right from defendants, like Searle, unless "the corporation renders itself amenable to suit in all the courts of the State by whosoever chooses to sue it there." *Ibid.*

The significance of this burden is particularly great in the case of corporations like Searle. Searle is now subject to long-arm jurisdiction in New Jersey in many product liability suits—*e.g.*, whenever its products were sold in New Jersey and the alleged injury and treatment occurred there. Because of the great volume of this litigation, Searle would have no choice but to do whatever necessary to obtain the benefit of the statute of limitations if the tolling statute were valid. However, by appointing a registered agent, Searle would greatly expand its amenability to suit in New Jersey. Under the "fairness" standard test that now determines whether Searle is subject to suit in a particular case, the decisive factors are on "the relationship among the defendant [Searle], the forum [New Jersey] and the [particular] litigation." *Shaffer* v. *Heitner*, 433 U.S. 186, 204 (1977); see *Rush* v. *Savchuk*, 444 U.S. 320, 327-330 (1980). There is much litigation involving Searle that has absolutely *no* relationship to New Jersey. For example, in suits involving Searle securities that are issued elsewhere, contracts made and executed in other states, and corporate decisions made elsewhere, there would be no relationship between the litigation and a New Jersey forum. Because Searle itself has at most an attenuated relationship with New Jersey, New Jersey could not assert *in personam* jurisdiction over Searle in such cases under the "fairness" standard. *See Shaffer* v. *Heitner*, *supra*, 433 U.S. at 213-217; *Rush* v. *Savchuk*, *supra*, 444 U.S. at 327-330; *cf. World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286 (1980). Nevertheless because consent is a basis for personal jurisdiction when no minimum contacts exist, Searle would be subject to suit in New Jersey in *all* such cases if it appointed a

registered agent, even on such "foreign" causes of action that are unrelated to New Jersey.[11] *See National Equipment Rental Ltd.* v. *Szukhent*, 375 U.S. 311 (1964); *Neirbo* v. *Bethlehem Shipbuilding Corp., Ltd.*, 308 U.S. 165 (1939); *Pennsylvania Fire Ins. Co.* v. *Gold Issue Mining Co.*, 243 U.S. 93 (1917); pp. 16-17, *supra*.

The effect of statutes like the New Jersey statute on interstate commerce is devastating. "If one State can impose such conditions, others can, and in that way corporations engaged in interstate commerce can be subjected to great embarrassment and serious hazards in the enforcement of . . . rights directly arising out of and connected with such commerce." *Sioux Remedy Co.* v. *Cope*, *supra*, 235 U.S. at 205. Indeed, if every state enacted such a statute, corporations like Searle would be subject to suit in every state in any suit. Because the functioning of interstate commerce would be seriously disrupted if corporations could be burdened with suits in inconvenient forums, the Commerce Clause itself prohibits such burdens on interstate commerce. *See, e.g., Davis* v. *Farmers' Co-operative Equity Co.*, 262 U.S. 312, 317-18 (1923); *Scanapico* v. *R.F.& P. R. Co.*, 439 F.2d 17, 25-28 (2nd Cir. 1970) (en banc.).

The interference with interstate commerce is compounded by the fact that the only way Searle can appoint a registered agent and avoid the New Jersey tolling statute is by obtaining a "certificate of authority" and thereby generally subjecting itself, by the terms of the statute, to the "duties, restrictions, penalties, and liabilities" imposed on domestic New Jersey corporations. *See* N.J.S.A. 14A:13-2, 13-4. Because these burdens have been held to be *per se* impermissible elsewhere, a state statute that so interferes with interstate commerce can plainly be valid only if neces-

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[11] The doctrine of *forum non conveniens* might afford Searle some minimal protection against litigating matters in New Jersey where it would be a grossly inconvenient forum. However, because this doctrine is limited in scope, and wholly discretionary, it affords little protection. *See generally Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501 (1947).

sary to achieve the most important local objectives. The New Jersey tolling statute does not pass this or any other test.

2. The Local Benefits Are Insufficient To Justify These Burdens.

The New Jersey tolling statute has been defended on the ground that it is easier for a plaintiff to obtain jurisdiction over a foreign corporation by serving a registered agent in New Jersey than it is to effect extraterritorial service under the long-arm provisions. However, none of New Jersey's three purported reasons for wishing to simplify matters for plaintiffs suing foreign corporations in New Jersey even begins to justify the burden on commerce.

One state interest that has been identified is assuring plaintiffs a New Jersey forum and sparing them the "burden" of "gather[ing] sufficient information to satisfy a court that [the extraterritorial] service is 'consistent with due process of law.' " *Velmohos* v. *Maren Engineering Corp., supra*, 416 A.2d at 381. However, this Court held in *Shaffer* v. *Heitner* that any interest in relieving plaintiffs the obligation of establishing jurisdiction under the "minimum contacts" test, in assuring a forum, and in thus simplifying litigation for the plaintiff is illegitimate *per se*.

> "[W]hen the existence of jurisdiction in a particular forum under [the fairness standard of] *International Shoe* is unclear, the cost of simplifying the litigation by avoiding the jurisdictional question may be the sacrifice of 'fair play and substantial justice.' *That cost is too high.*" 433 U.S. at 211 (emphasis added).

Plainly, the State's interest is even less sufficient here where the question is not the existence of *quasi in rem* jurisdiction under the Due Process Clause, but the permissibility of particularly burdensome restrictions under "such higher standards as the Commerce Clause may entail." *Scanapico* v. *R.F. & P.R. Co.*, 439 F.2d 17, 26 (2nd Cir. 1970) (en banc).

A second local benefit that is asserted arises from the fact that the New Jersey long-arm rule requires that a plaintiff determine, after "diligent inquiry", that there is no means of effecting service in the State before he may resort to extraterritorial service. In other words, the New Jersey rule requires that two steps must be followed for extraterritorial service whereas only one step must be followed for in-State personal service. The Court of Appeals held that the State interest in sparing plaintiffs the burden of going through two modest steps, rather than one, justifies a statute that absolutely denies the statute of limitations to unrepresented corporations and effectively requires them to consent to any suit in New Jersey.

There is no merit to the Court of Appeals' reasoning. Even assuming the statute operated to simplify matters for plaintiffs,[15] any local benefit is far too slight to justify the burden on commerce. More fundamentally, because the rule preferring in-State to extraterritorial service is entirely a creation of New Jersey state law and serves no discernible purpose, there obviously is an alternative means of achieving the State interest that would not burden interstate commerce. All New Jersey needs to do is to repeal its archaic requirement that a plaintiff show inability to serve process within the state or modify it if the statute of limitations would otherwise expire. Clearly, a State cannot place minor obstacles in the path of a local party and then rely on the existence of these obstacles to burden interstate enterprises. State regulation must adopt the means of achieving any legitimate purpose that imposes the fewest burdens on interstate commerce. *See, e.g., Pike* v. *Bruce Church, Inc., supra,* 397 U.S. at 142; *Dean Milk Co.* v. *City of Madison,* 340 U.S. 349 (1951).

[15]There is considerable evidence that plaintiffs find long-arm service easier than service on an appointed agent. For example, in one recent case, the plaintiff sued two foreign corporations, one of whom had an appointed agent, but one of whom did not. The plaintiff effected long arm service on *both* corporations. *See* Jurisdictional Statement, *Maren Engineering Corp.* v. *Velmohos,* No. 80-629, p.10.

The final local interest that is allegedly served by the New Jersey tolling statute is that it protects those plaintiffs who could not locate a foreign corporation "in the sprawling country beyond New Jersey's borders," *Velmohos* v. *Maren Engineering Corp.*, *supra*, 416 A.2d at 380, but who could locate an appointed agent or office of the foreign corporation located in New Jersey. This local interest is not even involved in the present case because Searle's identity as the manufacturer of Enovid and its address in Skokie, Illinois, were known to respondents at least four years before the filing of suit.[16] But even if local interest were advanced here, any local benefit simply cannot justify the interference with commerce that results. The tolling statute does *not* toll the statute of limitations *only* during the period in which the plaintiff could not reasonably have located and served the foreign corporation. On the contrary, it indefinitely postpones the running of the statute of limitations, tolling it for decades after the plaintiff first learned the out-of-state defendant's location. Any local interest could readily be advanced by a narrowly drawn statute that would avoid the great burden on interstate commerce entirely. There is an obvious less restrictive alternative.

Moreover, there are provisions in *existing* New Jersey law that promote this interest—or could be readily adapted to doing so—without burdening interstate commerce. New Jersey courts have held that a cause of action does not accrue until the existence of a cause of action against a particular defendant could reasonably be discovered. This doctrine could readily be applied to extend the limitations period until the defendant's location can be discovered.[17] In addition, New Jersey law provides that a plaintiff

[16]Thus, although respondents made numerous attempts to avoid the two-year statute of limitations, see p. 7 n.4, *supra*, respondents have never argued in this case that they had any difficulty locating Searle.

[17]Indeed, the "discovery" rule has already been extended to protect plaintiffs who are aware of the basis of their claims, but unaware of the proper *identity* of a potential defendant. *E.g. Aruta* v. *Keller*, 134 N.J. Super. 522, 342 A.2d 231 (App. Div. 1975).

can file a complaint and stop the running of the statute of limitations without serving the defendant with process. Such complaints are absolutely immune from dismissal for six months after filing and may not be dismissed thereafter if the plaintiff demonstrates his diligence in attempting to locate and serve the defendant. See N.J. Ct. Rules 1:13-7, 4:2-2.[18]

For all these reasons, the burden on interstate commerce is plainly disproportionate to any legitimate local benefits. The tolling statute is thus invalid under the Commerce Clause as applied to corporations like Searle.

II. The New Jersey Statute Violates The Due Process And Equal Protection Clauses Of The Fourteenth Amendment.

The New Jersey statute further violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment. The statute imposes an unconstitutional condition on Searle's exercise of its due process rights. There is no sufficient justification for the discrimination against unregistered foreign corporations that are not "doing business" in New Jersey.

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[18]The Court of Appeals stated (Cert. Pet. 24a), that it does not believe that this procedure affords plaintiffs the same protection as the tolling statute because it doubted that, given crowded calendars, state courts would permit these complaints to remain on the docket for indefinite periods of time. This reasoning is flawed and plainly does not affect Searle's Commerce Clause claim. First, this procedure need not *indefinitely* postpone the statute of limitations to be an adequate alternative. All it need do is protect a plaintiff who cannot locate a defendant. Second, there is no basis for the Court's suggestion that New Jersey courts would disobey the terms of the law and dismiss suits when the plaintiff had not and could not, in the exercise of due diligence, locate and serve the defendant. Indeed, New Jersey could have liberally applied this rule when dismissal would erect a statute of limitations bar. *See Cooke* v. *Yarrington*, 62 N.J. 123, 299 A.2d 400, 402-03 (1973). Finally, whether this procedure or any other existing New Jersey procedure is in fact now adequate is not the issue. The point is that New Jersey has a variety of procedures available to it that will protect its legitimate local interests without unduly burdening interstate commerce.

A. The Statute Unconstitutionally Burdens Searle's Rights Under The Due Process Clause.

It is basic that a State may not require any person to forego a constitutional protection as a condition to the enjoyment of a state right or privilege. *See, e.g., Sherbert* v. *Verner*, 374 U.S. 398, 404 (1963). This principle is fully applicable to attempts by states to impose unconstitutional conditions on foreign corporations. In *Terral* v. *Burke Construction Co.*, 257 U.S. 529 (1922), for example, this Court held that a State may not condition a foreign corporation's "valuable privilege" of "doing business" in the State on the corporation's waiver of its constitutional right to remove actions brought in state court to federal district court. Last term, moreover, this Court held, after an exhaustive analysis of the relevant cases, that it is "now established" that although a State has authority to regulate foreign corporations that are "doing business" within its boundaries, it may not impose conditions that require the relinquishment of constitutional rights. *Western and Southern Life Ins. Co.* v. *State Bd. of Equalization*, U.S. , 49 L.W. 4542, 4544-47 (May 26, 1981). It follows *a fortiori* that a State like New Jersey cannot constitutionally extract waivers of constitutional rights from a corporation like Searle that is *not* "doing business" in the State. Yet that is precisely the effect of the New Jersey tolling statute.

The interests affected by the New Jersey statute are far more clearly of constitutional dimensions than was the right to invoke diversity jurisdiction at stake in *Terral* v. *Burke Construction Co.*, *supra*. All persons have a right under the Due Process Clause of the Fourteenth Amendment not to be sued on claims in the courts of any state when the minimum contacts test of *International Shoe* and its progeny cannot be satisfied. *See, e.g., Rush* v. *Savchuk*, 444 U.S. 320 (1980); *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286 (1980). The New Jersey tolling statute, however, bars a foreign corporation from exercising the important right to plead the statute of limitations unless it waives this fundamental interest protected by the Due Process Clause.

For the reasons previously stated (see pp. 25-28, *supra*), none of the interests that the New Jersey tolling statute purportedly serves are sufficiently compelling to justify the statute's interference with this constitutional right. The asserted interest in sparing plaintiffs the burden of demonstrating minimum contacts is impermissible *per se*. *See Shaffer* v. *Heitner*, 433 U.S. 186, 211 (1977). The local interests of simplifying service of process for the plaintiff and tolling the statute of limitations when an out-of-state defendant cannot be located can each clearly be advanced by methods that will not adversely affect Searle's constitutional rights.[19]

B. The Tolling Statute Impermissibly Discriminates Against Foreign Corporations That Are Not "Doing Business" In The State.

Finally, quite apart from the foregoing matters, the New Jersey tolling statute violates the Equal Protection Clause. The New Jersey tolling statute prohibits a corporation that is not "doing business" in the State and that has not therefore registered an agent to accept service of process from *ever* asserting the statute of limitations, even though the corporation was amenable to long-arm jurisdiction in the State in the particular case at all relevant times. In contrast, all domestic corporations and all registered

[19]There may, of course, be foreign corporations that have such extensive activities in and such a strong relationship with forums, like New Jersey, that it would be constitutionally permissible for the State to treat the corporation as "domiciled" in New Jersey and thus as generally subject to suit in New Jersey. However, New Jersey has never attempted to justify its application of the tolling statute to corporations like Searle on such a ground. On the contrary, to the extent it seeks to "domesticate" corporations with extensive activities in the State, New Jersey advances this objective through its statute that requires corporations that "transact business" in New Jersey to appoint agents and comply with registration requirements. N.J.S.A. 14A:13-1, *et seq*. Yet this statute indisputably does not apply to Searle, and, for the reasons stated in Part I.A, *supra*, it could not constitutionally be applied to corporations, like Searle, that are engaged only in interstate business in New Jersey.

foreign corporations doing business in the State may claim the benefit of the statute of limitations. This statutory classification does "not rest on some ground of difference" that has a substantial relationship to any permissible object of the legislation and flatly violates the constitutional prohibition against disparate treatment of "persons similarly circumstanced." *Reed* v. *Reed*, 404 U.S. 71, 75-76 (1971), *quoting Royster Guano Co.* v. *Virginia*, 253 U.S. 412, 415 (1920).

Although the New Jersey statute will not satisfy even the "familiar 'rational basis' test", *see Minnesota* v. *Clover Leaf Creamery Co.*, U.S. , 49 L.W. 4111, 4112 (January 21, 1981), this statute must satisfy a heightened standard of review to be constitutional. First, because the statute affects fundamental constitutional rights under the Due Process and Commerce Clauses, *see* pp. 18-28, *supra*, strict scrutiny is required. *See Shapiro* v. *Thompson*, 394 U.S. 618 (1969). Second, because registered corporations "doing business" in New Jersey and domestic corporations can assert the statute of limitations, the burden of the law falls exclusively on enterprises that are *not* doing business in New Jersey and that are not represented in this State's legislature. In this circumstance, a statute must be carefully scrutinized. *See Austin* v. *New Hampshire*, 420 U.S. 656, 662 (1975); *Allied Stores* v. *Bowers*, 358 U.S. 522, 532-33 (1959) (Brennan, J., concurring); *cf. Hicklin* v. *Orbeck*, 437 U.S. 518 (1978).

The classification at issue here will not withstand any level of scrutiny, heightened or otherwise. Because corporations like Searle are indisputably readily subjected to long-arm jurisdiction, there is no justification for *forever* denying them the benefit of the statute of limitations that all other corporations can assert. As Searle has already demonstrated (pp. 25-28, *supra*), the three reasons the Court of Appeals advanced for the statutory discrimination are lacking in substance, and they are palpably insufficient to justify the classification. Any state interest in ensur-

ing that a plaintiff can sue a defendant in New Jersey even when the fairness test of *International Shoe* cannot be met is insufficient *per se*. *Shaffer* v. *Heitner*, *supra*, 433 U.S. at 211. The supposed state interest in protecting plaintiffs against the burdens of locating out of state defendants and effecting service on them is similarly inadequate. The existing New Jersey procedures can already afford plaintiffs these protections, *see* N.J. Ct. Rule 1:13-7, 4:2-2, so any additional measures provided by the tolling statute are superfluous.

More fundamentally, the tolling statute indefinitely prohibits the assertion of the statute of limitations even where, as here, the plaintiff had no difficulty locating or serving the foreign corporation. If the purpose of the tolling statute is to protect plaintiffs against the difficulties of making extraterritorial service, the equal protection clause demands that the length of time that the statute is tolled bear some relationship to delays a plaintiff experiences because of these difficulties. Here, in contrast, there is absolutely *no* relationship between the means selected and the supposed legislative objective.[20] The sole effect of the tolling statute to create the absurd anomaly that the timing of suits against unrepresented foreign corporations would be entirely controlled by the whim, caprice, and convenience of plaintiffs. The Oklahoma Supreme Court has emphasized the irrationality of such a result:

> "Residents of our 49 sister states would always be in peril of being subjected to litigation about events which occurred in the distant past and, as the trial judge correctly pointed out, in some situations the threat would remain even against their estates. The proper time for commencement of litigation against nonresidents would be controlled only by the whim, caprice, and convenience of plaintiffs." *Wright* v. *Keiser*, 568 P.2d 1262, 1265 (Okla. Sup. Ct. 1977).

[20]The effect of the statute is to create a permanent, *irrebuttable* presumption that unregistered foreign corporations like Searle cannot ever be readily located and served. This is an independent ground for finding the statute to be violative of the Fourteenth Amendment. *See Vlandis* v. *Kline*, 412 U.S. 441, 446 (1973).

The fact that there is *no* substantial relationship between the statutory means and the sole permissible statutory objective that has been identified is dispositive. However, there is a more fundamental reason why this statute cannot constitutionally be applied here. The legislative purposes identified by the Court of Appeals plainly were not the goals of the legislature that enacted the statute, and the application of the tolling statute to Searle unquestionably cannot advance any objective of that legislature.[21]

The reality is that there was no long-arm jurisdiction when the present version of the tolling statute was enacted in 1949. The sole purpose of the statute, as enacted, therefore, was to preserve a plaintiff's cause of action when there was no means of obtaining *in personam* jurisdiction over a foreign corporation in New Jersey. The circumstance that the tolling statute became potentially applicable to suits against defendants readily amenable to suit in New Jersey arose, in 1958, when the New Jersey Supreme Court promulgated its long-arm rule. The New Jersey legislature quite simply has never made a conscious policy choice that unrepresented defendants amenable to long-arm jurisdiction should indefinitely be precluded from asserting the statute of limitations. This anomaly has arisen, rather, because different organs of the

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[21]The Court of Appeals held that it was enough if some legitimate state purpose would be advanced, even if the legislature never expressly intended to further this goal. However, in assessing similar claims under the Due Process and Equal Protection Clauses, this Court has held the focus should be on whether the statute actually furthers the actual purpose of the legislature that enacted it, particularly where, as here, the statute affects important constitutionally protected interests. A statute may not be upheld on the basis of a supposed objective where, as here, "an examination of the legislative scheme and its history demonstrates that the asserted purpose could not have been a goal of the legislation." *Weinberger* v. *Weisenfeld*, 420 U.S. 636, 648 n.16 (1975); *see also State of Minnesota* v. *Clover Leaf Creamery Co.*, *supra*, 49 L.W. at 4113 n.7; *Schweiker* v. *Wilson*, U.S. , 49 L.W. 4207, 4213 (March 3, 1981) (dissenting opinion of Powell, J.); *but cf. United States Railroad Retirement Bd.* v. *Fritz*, U.S. , 49 L.W. 4035, 4038 n.10 (Dec. 9, 1980).

Government of New Jersey acted at different times and prescribed discrete rules, without ever explicitly considering the consequences for defendants amenable to long-arm jurisdiction.

The anomalous nature of the New Jersey tolling statute is graphically illustrated by the fact the New Jersey legislature has never intended to require corporations like Searle to register to do business in New Jersey. *See Materials Research Corp.* v. *Metron*, 64 N.J. 74, 312 A.2d 147 (1973). Yet the tolling statute effectively requires them to do so.

Because foreign corporations, like Searle, are amenable to long-arm jurisdiction, the application of the tolling statute to them is not necessary to preserve a plaintiff's right to sue in New Jersey or to further the sole goal the New Jersey legislature sought to achieve in 1949. In any case, because the New Jersey statute discriminates against unrepresented foreign corporations when there is no substantial relationship between such discrimination and even the *post hoc* hypothetical purposes identified by the Court of Appeals, the statute violates the Equal Protection Clause.

CONCLUSION

For the reasons stated, the judgment of the Court of Appeals for the Third Circuit should be reversed.

Respectfully submitted,

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